IN THE DISTRICT COURT OF BEAVER COUNTY, OKLAHOMA

FITZGERALD FARMS, LLC, on behalf of itself and all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	**Case No. CJ-10-38-A**
CHESAPEAKE OPERATING, L.L.C.,	)	
Defendant,	)	
v.	)	
CHARLES DAVID NUTLEY, W. STEPHEN SMITH AND JAMES W. POLONIS,	)	
Objectors.	)	

OPPOSITION TO EXPEDITED MOTION TO COMPEL DEPOSITION AND BRIEF IN SUPPORT

COMES NOW Objector Charles David Nutley by and through his counsel Stephen C. Griffis and in response to Plaintiff Settlement Class' Expedited Motion to Compel Deposition prays that this Court deny this motion for the reasons set forth herein.

BRIEF IN SUPPORT

Plaintiffs' counsel's single-minded desire to prevent the appeal of their fee is without merit, has gone well-beyond ethical boundaries, and is at this point verging on a breach of fiduciary duty to the class. They have no justification to depose Objector Nutley, other than to punish and burden him for having the temerity to oppose their fee. This Court should not accept Plaintiffs' invitation to frustrate or obstruct the appeal of its order, or otherwise be seen to penalize an objecting class member for doing no more than exercising the right to appeal to a higher court. If the appeal is deemed to be without merit, then it will be dismissed or lost on its merits, and if there is some impropriety in bringing it, it is for the higher courts to address.

I. There is no exigency justifying an expedited motion to compel discovery.

Oklahoma has a comprehensive system of civil procedure governing discovery and motions to compel, which affords litigants the opportunity to present their arguments and evidentiary support in a professional, coherent, and organized fashion. While there may be circumstances justifying the truncation of those procedures and associated time periods, this is not one of them. Plaintiffs have no explanation for why they cannot make this motion in the ordinary course.

Plaintiffs fault Objector Nutley for failing to file a motion to quash. He might have, except that Plaintiffs did not allow sufficient time between the service of the notice, the deposition date, and this motion for his counsel to make the motion given their prior professional obligations. Regardless, as discussed further below, there was never a valid deposition notice; Mr. Nutley's refusal to attend was justified, as was his insistence that Class Counsel follow the relevant procedural rules for noticing a deposition.

As discussed below, Plaintiffs for some reason believe that they can shortcut procedural rules and impose impermissible burdens on objectors' counsel – then blame objectors' counsel for failing to meet those burdens – in order to manufacture opportunities to allege misconduct by objector and his counsel. It is improper and unethical, and this Court should not countenance it.

II. This Court lacks personal jurisdiction over Objector Nutley sufficient to support a party deposition notice.

Plaintiffs have not shown, and cannot show, that Objector Nutley has any minimum contacts with the State of Oklahoma such that he may be served with process compelling him to answer to a lawsuit there, much less sit for a deposition as a party. The mere fact that Nutley submitted an objection in response to this Court's assertion of jurisdiction over the claims in the class action does not constitute purposeful availment sufficient to subject him either to general or specific jurisdiction in this Court. Courts are "unwilling to allow states to assert personal jurisdiction over foreign defendants where the defendant's presence in the forum arose from the unilateral acts of someone other than the defendant." *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1092 (10th Cir. 1998); *see also Walden v. Fiore*, 134 S. Ct. 1115, 1122-23, 188 L. Ed. 2d 12 (2014) (jurisdiction must be based on minimum contacts other than a defendant's incidental relationship with the plaintiff in the forum); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112-13 (1987) (finding no jurisdiction where, among other things, defendant did not control or employ the system which brought its product to the forum).

Objector did not select the forum for the lawsuit against Chesapeake. Instead, the parties held the litigation here and settled it on a nationwide basis, and this Court took jurisdiction over the claims of absent class members. As a necessary constitutional prerequisite, this Court issued notice informing absent class members to opt-out or object. To assert his right to object, Objector Nutley had no choice but to file it in this Court; he did not voluntarily choose the forum. *E.g., Green v. Transitron Electronics Corp.*, 326 F.2d 492, 498-99 (1st Cir. 1964) (noting in fee award context that objector's appearance was in response to court's order "directed to the class and inviting objections to proposed settlement" so that objector "was not a volunteer but came in at the invitation of the court."). That happenstance contact with the forum does not confer personal jurisdiction for the purposes of a spin-off class action against him in Oklahoma for breaching a settlement agreement he is not a signatory to, much less discovery attending it.

The lack of personal jurisdiction would not necessarily preclude the issuance of a valid subpoena to obtain testimony from Mr. Nutley if he had relevant testimony to give. *See* 12 O.S. 3230. But, as discussed below, Plaintiffs declined to take that approach and framed their discovery on the theory he was subject to being deposed as a party, in Oklahoma, without additional process. That was incorrect and an attempt to deny due process, and Objector Nutley was not required to cheerfully play along.

III. Plaintiffs have failed and refused to comply with Oklahoma's procedural requirements on discovery.

Putting aside the lack of jurisdiction, Plaintiffs' attempts to force hardball discovery simply don't comply with the rules of procedure. Plaintiffs seek the deposition in aid of their newly-formed case, which names Objector Nutley as a defendant in a breach of contract class action based on the "best efforts" clause of the settlement agreement. The case commenced with a severance order on July 2, 2015, and it was not until July 14, 2015, when Plaintiffs served the "motion to enforce" the settlement (along with the deposition notice at issue here), that Objector Nutley first became aware of the precise claims being asserted against him.

The new case is a separate action altogether, in that it realigns several parties in interest, and asserts against Objector Nutley causes of action that are distinct from those asserted against defendant Chesapeake in the original case. Even if Nutley were a citizen of Oklahoma subject to personal jurisdiction and properly served with process on July 2, 2015 as a defendant, a deposition could not be noticed until August 3, 2015 at the very earliest. *See* 12 O.S. §3230A(2)(a)(2). The deposition notice was therefore void.

In response, and forgetting the newly-created case, Plaintiffs' counsel argue that "the case" commenced years ago, such that the time limits do not apply. However, the deposition notice was not served in the original case; it was served in the newly-commenced case against Objector Nutley, ostensibly for the purposes of establishing evidence in the new case. Plaintiffs themselves commenced that new case, and have now apparently complexified this matter beyond their own ability to understand the implications or comply with the discovery rules, and now simply wish to use both cases willy-nilly as a grab bag for discovery arguments. Oklahoma law simply doesn't support such tactics. *Spencer v. Nelson Sales Co.*, 1980 OK CIV APP 58, 620 P.2d 477, 479 & 483 ("gross error" in court's decision to sever certain defendant corporations, but then permit them to participate in the original case and trial as though each remained in the case, a result the reviewing court found "bizarre and unorthodox".)

Plaintiffs' self-serving relation-back theory would not assist them even if accurate, because even if they had not created a new case, they could not merely serve and enforce a party deposition notice against Objector Nutley in the original case anyway. Named parties in class actions are not privileged to notice post-judgment depositions of unnamed class members as if they were named parties all along. As discussed below, Plaintiffs did not and cannot make a showing sufficient to justify the discovery they seek. On the contrary, the showing they have made thus far is materially false, and should rightly bring sanctions, not a further license to abuse process.

IV. Plaintiffs have made a conclusory and false showing to support discovery directed at Objector Nutley.

Copying rote from a leading treatise, Plaintiffs say they need a deposition into Objector Nutley's "membership in the class and the factual basis for his objection...." Motion at 4, quoting NEWBERG ON CLASS ACTIONS 13:33 (5th ed.). That is inapplicable. Nutley established his membership in the class by submitting the required information, as Plaintiffs have conceded by setting forth the respective settlement shares of each of the objectors. Declaration of Daniel T. Reineke Regarding Allocations to Objectors filed June 15, 2015. Plaintiffs don't suggest that, after a judgment has been rendered setting the class members recoveries, they have discovered some factual discrepancy related to Objector Nutley's class membership that can only effectively be resolved by live testimony.

Nor can Plaintiffs reasonably assert they need to understand the "factual basis" for his objection. The objection is purely a question of law, applied to established evidentiary facts, relating to the proper method of fee calculation in contingent class actions under Oklahoma law. There is likewise no conceivable way that Plaintiffs' counsel do not understand the legal issue, or thoroughly know the "factual basis" surrounding it. They cannot explain what facts Objector Nutley might have knowledge of that are not already on the record, that bear on the propriety of their own counsel's fee under Oklahoma law. To the extent that they need assistance understanding the legal underpinnings of the objections to their fee, Objector Nutley – a layperson – is hardly the person to ask, and a contention-interrogatory style argumentative deposition where he is asked to supply "all factual bases" for his legal assertions is improper. *E.g., Lance, Inc. v. Ginsburg,* 32 F.R.D. 51 (E.D.Pa. 1962).

Reeling off the list in the treatise, Plaintiffs also say they are interested in Objector Nutley's "objection history." There is no need for a full-blown deposition to obtain that and, contrary to Plaintiffs' high hopes, it will be a disappointment. Had Plaintiffs bothered simply to ask Objector Nutley's counsel, they would have discovered that there is only ***one*** other case in which he has ever objected, 8 years ago, *Adkisson v. Koch Industries Inc.*, in Seminole County Oklahoma. In that case, Mr. Nutley was joined by Chesapeake as an objector to the fee award on appeal. Chesapeake made the exact same fee arguments in *Koch* that Mr. Nutley is making here. *See Exhibit A.* Nutley's counsel were the same as in this case. There was no payment to objectors or their counsel in that case; the objector-appellants ultimately sought review by the Oklahoma Supreme Court, which declined, ending the case without incident. The chief difference between this case and the prior objection is that the law has since become clearer that Plaintiffs' counsel's 40% contingent fee is excessive and unlawful. In light of the actual facts, Plaintiffs' confident and repeated assertions that Mr. Nutley is a "serial objector" who is obviously bent on extorting money are ludicrous, not to mention defamatory.

Plaintiffs further suggest that discovery upon objectors is permitted when their counsel have a record of abusive objection tactics, or are "professional objectors" who file boilerplate objections. Motion at 4. But Plaintiffs never made such a showing, and instead merely spewed out a blizzard of irrelevant *ad hominem* attacks on Objector and his counsel. Plaintiffs have never submitted evidence that Objector's counsel have engaged in any of the abusive tactics or practices that potentially mark objectors or their counsel for disparate treatment or liberalized discovery. *See* NEWBERG ON CLASS ACTIONS § 15:37 (4th ed.) ("Abusive Conduct by Counsel Objecting to Class Action Settlements").

Plaintiffs' inappropriate and unsupported *ad hominem* attacks do not justify extraordinary discovery directed at Objector or his counsel, or otherwise support curtailment of their right to practice unhindered, without bias towards their client, or the unjustified infringement of his right to employ the counsel of his choice.

V. Objector Nutley's Appeal will not harm the class in any way, and may add tens of millions of dollars to the class fund for later distribution

As Plaintiffs point out, Objector Nutley does not formally represent the class. Nevertheless, he is entitled to object to, and appeal from, the fee award for the benefit of that class. *Devlin v. Scardelletti*, 536 U.S. 1, 6–7, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002). The role of objectors in safeguarding the interests of the class in connection with class counsel's fees is well-established. Courts acknowledge that class counsel's interests diverge from those of the class when it comes to their own attorneys' fees, and that it is the legitimate role of objectors to bring adversarial analysis to the fee award.

If he is successful, Objector Nutley's counsel may be entitled to a fee under the common fund doctrine for increasing the amount of the class fund. "[W]hen objections "result in an increase to the common fund, the objectors may claim entitlement to fees on the same equitable principles as class counsel." *Rodriguez v. Disner*, 688 F.3d 645, 658 (9th Cir. 2012) (error to refuse award to objectors' counsel Nutley and Pentz, when they successfully appealed fee award), citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051-52 (9th Cir. 2002); *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (observing that "if a settlement more favorable to the class is negotiated and approved, the objectors will receive a cash award that can be substantial."); *Gottlieb v. Barry*, 43 F.3d 474, 491 (10th Cir. 1994) (district court erred in denying objectors' counsel fees when their arguments resulted in a reduction of certain fee and expense awards, and thereby benefitted the class).

A potential common-fund fee award is an obvious and entirely proper motivation for Nutley's counsel to prosecute an objection to the fee, just as it was a proper motivation for Plaintiffs and Class Counsel to sue defendant Chesapeake to obtain the class fund in the first place. *See Gottlieb*, 43 F.3d at 489 (observing that the financial motivations of lawyers providing services that benefitted the class were not relevant to whether they should be compensated for their work: "Whether motivated by altruism, greed, or entrepreneurial zeal, the quality of the attorneys' legal services should be objectively ascertainable.")

Neither Objector Nutley nor any of his counsel has done anything in this case that amounts to bad faith or even questionable tactics. Meanwhile, Plaintiffs' counsel have engaged in a flurry of novel and increasingly extra-legal methods of penalizing Objector Nutley for questioning their fee award. More fundamentally, Plaintiffs cannot support the idea that that appeal will delay the class' recovery or otherwise be the cause of any harm to the class. Objector Nutley has no objection to the distribution of the existing common fund to the class now, and nothing in Oklahoma law or procedure appears to

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prevent such a distribution. If the appeal is successful in reducing the fee and more money is added to the fund, a second distribution can be made. If the parties decline to make a class fund distribution now, then that is their own decision, over which Objector Nutley has no control.

Class counsel may not *like* the fact that their fee is subject to scrutiny and review, or that their fee may be reduced by a reviewing court and some of it returned to the class. But these possibilities do not constitute harm to the class they purport to represent.

CONCLUSION

WHEREFORE, Plaintiffs' motion to compel discovery should be denied.

Respectfully submitted,
Charles David Nutley,
By his attorney,

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CERTIFICATE OF SERVICE

The undersigned certifies that on July 23, 2015 he served a true copy of the foregoing document by email and first class U.S. mail, postage prepaid, on each of the counsel listed below:

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tabbies
DEFENDANT'S EXHIBIT
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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SAM ADKISSON; RONNY MOSELEY; THE CITY OF ELK CITY; RALPH MORRISON, AMERICAN PETROLEUM & MINERAL CO., INC. and IRIS LEVY,

Plaintiffs/Appellees,

-and-

CHESAPEAKE ENERGY CORPORATION, on behalf of itself and its subsidiary and affiliated entities,

Objector/Appellant,

-and-

CHARLES DAVID NUTLEY,

Objector/Appellant,

vs.

KOCH INDUSTRIES, INC.; KOCH OIL COMPANY, a division of Koch Industries, Inc.; KOCH EXPLORATION COMPANY; KOCH MIDSTREAM PROCESSING COMPANY; KOCH MIDSTREAM SERVICES COMPANY; KOCH SERVICE, INC.; KOCH GATHERING SYSTEMS, INC.; KOCH PIPELINES, INC.; and KOCH PIPELINES, L.P.,

Defendants/Appellees.

Case No. DF-106452
(Consolidated with Case No. DF-106455)

(Case No. S-CJ-99-192 Seminole County)

BRIEF-IN-CHIEF OF APPELLANT CHESAPEAKE ENERGY CORPORATION

Objector/Appellant, Chesapeake Energy Corporation, on behalf of itself and its subsidiary and affiliated entities ("Chesapeake"), respectfully submits this brief-in-chief pursuant to Okla.Sup.Ct.R. 1.10 and 1.11.

INTRODUCTION

Before this Court is the trial court's final order approving a class action settlement reached between counsel for the settlement class ("Class Counsel") and the defendants, Koch Industries, Inc., et al. (collectively "Koch"). Chesapeake is a member of the settlement class and one of the largest individual claim holders.

As a part of the trial court's approval of the class action settlement, the trial court awarded Class Counsel a 40% contingency attorney fee award in the amount of $7,520,000.00. The errors raised herein by Chesapeake relate to Class Counsel's request for, and the trial court's award of, the contingency attorney fee award.

SUMMARY OF THE RECORD

A. Settlement and Notice of Class Settlement.

On or about October 12, 2007, the trial court preliminarily approved a class action settlement reached between Class Counsel and Koch settling the class members' claims against Koch for the underpayment of oil. (*See* Order of Preliminary Approval, R. at 1176-1184.) On or around March 14, 2008, a Notice of Proposed Settlement of Class Action and Hearing (the "Notice") was mailed by Class Counsel and Koch to members of the following settlement class (the "Class"):

> All persons and entities owning royalty interest and leasehold interest in wells from which [Koch] purchased or sold oil in the State of Oklahoma between January 1, 1975, and December 31, 1989, where the oil was measured by hand gauging.

(*See* Notice at 1, R. at 1188-1189.)

Pertinent to this appeal, the Notice represented to the Class that the settlement consisted of two funds – (1) a "Class Fund" of $18,800,000.00 for the Class, and (2) a separate "Fee Fund" of $11,200,000.00 available only to Class Counsel. The Notice also represented that the Fee Fund for Class Counsel would "*not reduce the amount of money that is available for payment to Class Members*". (*See* Notice at Section III.B., R. at 1188-1189.)

Also pertinent to this appeal, the Notice advised the Class that each class member had until to May 2, 2008, to file a written objection to the settlement including the amount of the Fee Fund. (*Id.* at Section IV.) In an obvious effort to discourage any objections, however, the Notice further provided that Class Counsel was not obligated to file documentation in support of their fee request until May 5, 2008, three (3) days ***after*** the expiration of the deadline to file an objection to the proposed settlement. (*Id.* at Section III.B.)

B. Chesapeake Requests Discovery and Objects to Settlement.

On April 8, 2008, Chesapeake wrote to Class Counsel requesting certain information in order to evaluate the fairness of the proposed settlement. (*See* Ex. "2" to Objection of Chesapeake to Class Action Settlement, Request for Appointment of Receiver, and Motion to Conduct Expedited Discovery, R. at 1194-1229.) Chesapeake was particularly concerned with the fairness of the settlement in light of the atypical structure of the settlement whereby a large attorneys fee was already specifically incorporated in the settlement and segregated in a special fund separate from the amount to be distributed to the class. (*Id.*) This, plus the representation that the class would bear no attorneys fees, looked very sketchy.

Thus, Chesapeake sought more information form Class Counsel and Koch to explain what deal they had negotiated. Among other information requested, Chesapeake sought copies of documents evidencing the negotiations between Class Counsel and Koch that led to the split of a $30,000,000.00 settlement into a two distinct funds – one for the Class, and a second negotiated by Class Counsel exclusively for their own benefit. (*Id.*) Other than providing a copy of the settlement agreement itself, Class Counsel indignantly refused to supply Chesapeake (one of the largest class members, i.e. their clients) with any of the requested information.[1] Consequently, on April 28, 2008, Chesapeake was forced to file an objection to the settlement, a request for the appointment of a receiver to review in detail Class Counsel's fee request, and a motion for leave to conduct expedited discovery. (*See* Objection of Chesapeake to Class Action Settlement, Request for Appointment of Receiver, and Motion to Conduct Expedited Discovery, R. at 1194-1229.)

Chesapeake's request for the appointment of a receiver and its motion for leave to conduct expedited discovery were heard by the trial court on May 20, 2008. (See 5/20/08 Transcript, R. at 2435.) At that hearing, Chesapeake explained that discovery and/or the appointment of an independent receiver to review the fees was necessary since Class Counsel and Koch had entered into a "clear sailing agreement" under the terms of which Koch agreed not to contest Class Counsel's fee request:[2]

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[1] Indeed, on April 25, 2008, Class Counsel filed a motion seeking leave to file their attorney fee application ***under seal*** so that their putative client Chesapeake and other class members could not review the information contained in the fee application. (*See* Plaintiff's Application to File Fee & Cost Statement Under Seal, R. at 1190-1191.)

> Mr. Gipson: Class Counsel have taken the Defendants out of the picture. Under the settlement, the Defendants have agreed not to protest the fees.
>
> The Court: Yes, sir.
>
> Mr. Gipson: So rather than having a typical adversarial proceeding where one side is actually capable of and knowledgeable and ready to challenge the other side, what we have here is going to be a one-sided presentation of evidence. We're not going to hear from the Defendants or their story, only from the Plaintiffs. ***Your Honor is only going to get to see what the Plaintiffs decide to show your Honor***. Without discovery there's going to be a gap in the facts of the story or evidence, however Your Honor would like to describe it. That is why I believe the discovery is necessary.

(*See* 5/20/08 Transcript at p. 18, ln. 10-25, R. at 2435.) (emphasis supplied.)

Notwithstanding the existence of a "clear sailing agreement" between Class Counsel and Koch, and a class settlement which established a pre-agreed separate $11.2 million dollar Fee Fund for Class Counsel, the trial court refused to appoint a receiver or allow any discovery regarding the negotiations between Class Counsel and Koch creating a separate fee fund for the sole benefit of Class Counsel. (*See* 5/20/08 Transcript at p. 13-23, R. at 2435.) Indeed, the only information relative to the Fee Fund, which the trial court permitted Chesapeake to see, was Class Counsel's time records. (*Id.* at p. 26.)

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[2] In general, a "clear sailing agreement" is one where, as here, the defendant in a class action lawsuit has agreed not to contest the amount of the attorney fees sought by class counsel so long as class counsel seek a fee beneath a negotiated ceiling. *See Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518 (1st Cir. 1991). "[T]he very existence of a clear sailing provision increases the likelihood that class counsel have bargained away something of value to the class." *Id.* at 524. It also "by its nature deprives the court of the advantages of the adversary process [by eliminating the defendant from the picture]." *Id.*

C. **Class Counsel File Application for Attorney Fees.**

On May 5, 2008, three days *after* the expiration of the deadline for the Class to object to the fairness of the proposed settlement, Class Counsel filed a Motion for Attorney Fees, Litigation Costs, and Class Representative Fees from the Common Fund (the "Fee Motion"). (*See* Fee Motion, R. at 1289-1651.) In their Fee Motion, Class Counsel asserted for the first time that they believed they were entitled to up to a 40% contingency fee to be paid as a percentage of the "common fund". (*See* Fee Motion at 1.) Class Counsel identified the "common fund" in this case as the total settlement amount agreed to be paid by Koch – i.e., $30,000,000.00. (*Id.* at 12.) Class Counsel also urged the trial court to disregard the lodestar approach approved by the Oklahoma Supreme Court in *Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659, and instead simply enforce against the Class the 40% contingency fee agreements signed by the class representatives. (*Id.* at 1, 12-13.)

On May 30, 2008, Chesapeake filed its response in opposition to Class Counsel's Fee Motion. (*See* Chesapeake Response to the Fee Motion, R. 2023-2032.)[3] Chesapeake noted in its response that if the common fund was now, in fact, the entire $30,000,000.00 settlement fund, as maintained by Class Counsel in their Fee Motion, then any fee awarded to Class Counsel by the Court would indeed result in a reduction of the common fund otherwise available to the Class. (*Id.* at 2.) Thus, Chesapeake maintained the Notice mailed to the Class was misleading and deceptive since the Notice represented to the Class that any attorney fees awarded by the trial court would ***not*** reduce the amount of money available to the Class. (*Id.*) [4]

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[3] Notably, Class Counsel chose not to serve a copy of their Fee Motion on their putative client Chesapeake, notwithstanding the fact that Chesapeake entered an appearance (R. at 1192-93) on April 28, 2008, pursuant to Chesapeake's statutory right under 12 O.S. §2023(C)(2)(c) and Section IV of the Notice.

Chesapeake further asserted that the lodestar method approved in *Burk* for use in common fund cases should be utilized by the trial court to determine a fair and reasonable attorney fee. (*Id.* at 5). Finally, Chesapeake asserted that Class Counsel's attempt to enforce against the putative class members the contingency fee agreements signed by the class representative violated Rule 1.5(c) of the Oklahoma Rules of Professional Conduct. (*Id.* at 3-4.)

D. The Fairness Hearing.

The Fairness Hearing was held on August 11 and 12, 2008, in the District Court of Seminole County, State of Oklahoma, Seminole Division. Class Counsel called two expert witnesses in support of their fee request -- Michael Burrage and Brad Brickell. (*See* Fairness Hearing Transcript, Vol. I, at p. 50-116, R. at 2437; Fairness Hearing Transcript, Vol. II, a p. 201-273, R. at 2438.)

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[4] It is important to note that Class Counsel's fee expert, Michael Burrage, was in agreement with Chesapeake on this issue. Mr. Burrage testified at the fairness hearing that "a common fund is a pot of money available for distribution to a class." (*See* Fairness Hearing Transcript, Vol. 1, p. 86, ln. 5-7, R. at 2437.) When asked on cross-examination whether he would represent to the class that their share of the common fund would not be reduced by attorney fees, Mr. Burrage testified he would not make such a representation. (*Id.* at p. 86, ln. 16-20.)

Both fee experts called by Class Counsel admitted they were themselves class action plaintiff's attorneys. (*See* Fairness Hearing Transcript, Vol. 1 at p. 85, ln. 8-12; Fairness Hearing Transcript, Vol. 2 at p. 234, ln. 25 – p. 235, ln.2.) Neither fee expert called to testify by Class Counsel offered testimony on a reasonable hourly rate to be utilized by the trial court in a lodestar analysis. (*See* Fairness Hearing Transcript, Vol. 1 at p. 93, ln. 14 – p. 94, ln. 5; Fairness Hearing Transcript, Vol. 2 at p. 241, ln. 21 – p. 242, ln. 4.) Rather, both fee experts urged the trial court to disregard the lodestar approach approved in *Burk* and enforce against the class a percentage of common fund based on the contingency fee contracts signed by the class representatives.

Although their experts refused to opine as to appropriate hourly rates, claiming rates were irrelevant in class action fee applications, Class Counsel themselves did testify regarding their hourly rates. In their Fee Motion, Class Counsel argued they were entitled to be compensated at the rate of $500.00 per hour in the event the trial court utilized the lodestar approach approved in *Burk*. (*See* Fee Motion at 23, R. at 1289-1651.) At the fairness hearing, however, Class Counsel admitted they had never actually charged anyone that high of a rate.

Class Counsel Marvin Kaiser testified he charges $150.00 per hour for his services. (*See* Fairness Hearing Transcript, Vol. 2 at p. 180, ln. 23 – p. 181, ln. 15.) Class Counsel Ron McClain testified he charges $200.00 per hour for his services. (*Id.* at p. 300, ln. 7-9.) Class Counsel Jack Mattingly, Jr., testified that he and Jack Mattingly, Sr., charge $200.00 per hour for their services. (*Id.* at p. 365, ln. 4-10.) Class Counsel Gary Gordon (an attorney from Minneapolis) testified that during the course of this lawsuit, the hourly rate he has charged ranged from as low as $250.00 per hour to as high as $420.00 per hour. (*Id.* at p. 339, ln. 4 – 25.)

Class Counsel further disclosed that they had been awarded attorney fees in an identical class action lawsuit they filed against Koch on behalf of well owners in North Dakota. In the sister North Dakota action, the trial court awarded the very same Class Counsel as in this case a total attorney fee award (including incentive bonus) equating to an hourly rate of $175.00 per hour. (*See* Fairness Hearing Transcript, Vol. 2 at p. 180, ln. 10 – p. 181, ln. 1, Ex. "3".) Incredibly, Class Counsel described this sister case as a drilled "dry hole" in terms of the attorney fees awarded by the trial court. (*Id.* at p. 191, ln. 11 – 192, ln. 3.) Worse yet, on cross-examination, Class Counsel eventually admitted that they were hoping that the trial court in Seminole County would bring in a sizeable fee award to make up for Class Counsels' perceived short falls in their fee recoveries from their pursuit of Koch in other venues. (*Id.*)

E. The Ruling of the Trial Court.

On September 25, 2008, true to the hopes and dreams of Class Counsel, the trial court did in fact make up the shortfall of the overly stingy judge in North Dakota and entered its order approving the settlement and awarding Class Counsel a contingency attorney fee award of $7,520,000.00, i.e., imposing upon the class the 40% contingency fee contracts signed by the class representatives. (*See* Notice of Decision at 19, R. at 2274-2294.) As the stated basis for this award, the trial court concluded the award was appropriate because he was "not shocked by a 40% contingency fee". (*Id.*)

Although ultimately disregarded, the trial court did purport to perform a lodestar calculation. Incredibly, the trial court arbitrarily determined that a reasonable hourly rate in this case was $400.00 per hour even though that rate was twice what four of the five Class Counsel had ever charged in their lives to an actual client. (*Id.* at 17.)

Utilizing Class Counsels' actual represented hours of labor (3,652) and the inflated hourly rate of $400.00, the trial court calculated a lodestar base fee for Class Counsel to be $1,460,800.00. (*Id.* at 18.) Rather than applying a reasonable incentive multiplier to this base fee as authorized in *Burk*, the trial court abandoned the lodestar method entirely and impressed upon the class the 40% contingency fee contracts signed by the class representatives. (*Id.* at 19.)

ARGUMENT AND AUTHORITY

A. Standard of Review.

In a contested adversarial proceeding, the trial court's award of attorney fees is generally reviewed for an abuse of discretion. The fee application at issue in this case, however, was not part of a contested adversarial proceeding (particularly in light of the "clear sailing agreement" reached between Class Counsel and Koch to settle the case).

Pursuant to Oklahoma statute, a trial court is required to act as a "fiduciary" of the class when making a determination of fair and reasonable attorney fees in a class action proceeding.

> In class actions, in making an award of attorney fees, the court shall conduct an evidentiary hearing to determine a fair and reasonable fee for class counsel. ***In making***

such determination, the court shall act in a fiduciary capacity on behalf of the class.

See 5 O.S. §7.1 (emphasis supplied.)

Under settled Oklahoma law, a fiduciary is held to a far higher standard than a mere abuse of discretion. A "fiduciary" is "[a] person having duty, created by his undertaking to act primarily for another's benefit in matters connected with such undertaking." *See* Black's Law Dictionary (Revised 4th Ed. 1968). "As an adjective it means of the nature of a trust." *Id.* Under Oklahoma law, the fiduciary of a trust "is a fiduciary of the highest order" and must act "in the highest good faith toward his beneficiary [here the Class]." *See State ex rel. Oklahoma Bar Association v. Arnold*, 2003 OK 31, ¶24, 72 P.3d 10, 15; *Panama Processes, S.A. v. Cities Service Co.*, 1990 OK 66, 796 P.2d 276, 291.

As a statutory fiduciary of the class, the appropriate standard of review is whether the trial court below exercised the highest good faith towards the class (and not whether the trial court merely abused its discretion as a neutral arbiter of an adversarial dispute). Chesapeake respectfully submits that the trial court's decision to impress upon the Class a 40% contingency fee because that number did not "shock" him, falls far short of satisfying the trial court's fiduciary duty to the class. .

B. The Percentage of Common Fund Approach Adopted by the Trial Court Violates Rule 1.5(c) of the Rules of Professional Conduct

The trial court's imposition of a 40% contingency fee on all class members was improper. By Order of the Supreme Court of Oklahoma entered on April 9, 2007, Rule 1.5(c) of the Oklahoma Rules of Professional Conduct was revised to require that a contingent fee agreement not only be in writing, but also "signed by the client." *In re: Application of the Oklahoma Bar Assoc. to Amend the Oklahoma Rules of Prof'l Conduct and to Amend Rule 1.4 of the Rules Governing Disciplinary Proceedings*, 2007 OK 22, 171 P.3d 780. Revised Rule 1.5(c), which became effective January 1, 2008, now reads in pertinent part:

> A contingent fee agreement *shall* be in writing *signed by the client* and *shall* state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other-expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. (emphasis added.)

Chesapeake has never signed any fee agreement with Class Counsel which would authorize Class Counsel to receive a contingent fee – that is a fee based on percentage of the amount recovered on Chesapeake's claim in this case. Presumably, the same holds true for every other putative member of the Class other than the pliable class representatives.[5] The trial court's decision to abandon the lodestar method at the request of Class Counsel, and award Class Counsel a percentage of the common fund based on the contingency fee contracts signed by the class representatives, clearly violates amended Rule 1.5(c). In short, a contingency fee contract may not be enforced in a class action absent a written ratification by the class members. Consequently, the fee award should be reversed.

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[5] It is important to note that the class representatives were told by Class Counsel they would receive an incentive bonus in addition to their share of the settlement prior to signing the contingency fee agreements. (*See* Fairness Hearing Transcript, Vol. 2 at p. 317, ln. 23 – p. 318, ln. 4, R. at 2438.) Accordingly, the class representatives were not similarly situated to the Class when they signed their contingency fee agreements. Their incentive to sign such an agreement was tainted by their expectation of receiving a disproportionate share of the settlement fund through the combination of their class distribution and a class representative fee. Indeed, at the fairness hearing, the five class representatives in this case each sought an incentive bonus of $100,000.00 for a total of $500,000.00. (*See* Fee Motion at 30-31, R. at 1289-1651.)

C. **A Lodestar Analysis is the Proper Standard for Determination of Fees**.

Despite Class Counsel's urging that it is the preferred method, no Oklahoma Supreme Court case has ever adopted the "percentage of common fund" method of awarding attorneys fees in a class action. This is no surprise. The seminal case on attorneys fees in Oklahoma, *Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659, coincidentally involved a common, or equitable, fund. In that case, the Oklahoma Supreme Court squarely held that a lodestar analysis was the "proper standard" for a trial court to use when fixing attorney fees in an "equitable fund" case. *Id.* at 660-61.[6] In *Burk*, the Court on appeal awarded an incentive fee or bonus to plaintiff's counsel of 40% of the total hourly or lodestar fee. *Id.* at 662.

Notable, the *Burk* incentive award of 40% of the total hourly or lodestar fee is the highest incentive fee or bonus approved in reported Oklahoma decisions. *See e.g.*, *Spencer v. Oklahoma Gas & Electric Co.*, 2007 OK 76, 171 P.3d 890 (approving an incentive fee or bonus of 10% of the total hourly or lodestar fee); *Brashier v. Farmers Ins. Co. Inc.*, 1996 OK 86, 925 P.2d 20 (approving an incentive fee or bonus of approximately 20% of the total hourly or lodestar fee).

Utilizing the inflated hourly rate of $400.00 per hour, the trial court calculated Class Counsel's lodestar fee in this case to be $1,460,800.00. When the trial court's lodestar fee is compared to the $7.52 million dollar fee award entered by the trial court, the actual fee award results in an incentive fee multiplier of 5.14 of Class Counsel's lodestar fee (*i.e.*, \$7,520,000.00 ÷ \$1,460,800.00 = 5.14).

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[6] The term "equitable fund doctrine" is simply another name for the "common fund doctrine". *See* Black's Law Dictionary (7th Ed. 1999).

This multiplier is many times the magnitude ever approved in a reported Oklahoma decision, and far greater than the national average of 3 for large and complicated class action cases. *See Pinto v. Princess Cruise Lines, Ltd.*, 513 F.Supp.2d 1334, 1344 (S.D. Fla. 2007). Clearly, the trial court did not act as a statutory fiduciary of the class when approving Class Counsel's fee request at such an unprecedented lodestar multiplier.

In addition, the trial court used a grossly inflated hourly rate in its lodestar calculation. The court selected \$400.00 per hour despite undisputed testimony that based on the actual rates of Class Counsel, their average hourly rate charged to actual paying clients is \$239.00 per hour. (*See* Chesapeake's Closing Argument at 9-10, R. at 2162-2211.)

As heretofore discussed, neither fee expert called by Class Counsel testified as to a reasonable hourly rate to be applied in this case. Mr. Burrage testified as follows:

> Q: Okay. So I'm clear, you're not opining on a reasonable hourly rate, it's just your option that an hourly rate cannot be utilized in this type of case; is that right?
>
> A: What I'm saying is that oil and gas class action cases, the customary fee in Oklahoma is a percentage of the common fund or a contingent fee contract. I'm saying that with regard to hourly rates, that it is proper for a Court in its capacity in looking at a fee application to look at the amount of time spent, because that's one of the Burk factors.

Q: But you're not applying an hourly rate to the hours spent, are you?

A: No.

Q: And you're not opining what that hourly rate ought to be?

A: No.

(*See* Fairness Hearing Transcript, Vol. 1 at p. 93, ln. 14 – p. 94, ln. 5; R. at 2437.)

Mr. Brickell testified as follows:

Q: Did you perform any lodestar analysis in this case?

A: I looked at the hours that were expended, yes.

Q: Okay. I didn't hear you during your direct [testimony] opine as to what would be a reasonable hourly rate to utilize in a lodestar calculation.

A: No, because I believe that the opinions that I quoted said that hours and hourly rate are not the point that is to be given the greater weight in determining a fee. It is the result obtained. And you look at a percentage of the result obtained.

Q. So the answer to my question is no?

A: The answer to your question is I was also instructed not to duplicate testimony that was already before the court.

Q: And whose testimony are you referring to?

A: Mr. Michael Burrage from yesterday.

Q: And do you recall Mr. Burrage also testified he was not offering an opinion as to what a reasonable hourly rate would be?

A: I believe he testified that this fee in this case should not be based upon an hourly rate.

(*See* Fairness Hearing Transcript, Vol. 2 at p. 241, ln. 21 – p. 242, ln. 4., R. at 2438).

The trial court's $400.00 hourly rate is unsupported by the expert testimony, and is twice as high as Class Counsel's actual hourly rates. It is also over twice as high as the hourly rate Class Counsel received in the identical class action case they filed against Koch in North Dakota ($175.00/hour).

Utilizing the average hourly rate actually charged by Class Counsel to paying clients, Class Counsel's lodestar fee in this case is $872,828.00 ($239.00/hour x 3,652 hours = $872,828.00). Applying the national average lodestar multiplier of 3 for large and complicated class action cases, the total fee award in this case should not have exceeded $2,618,484.00 (i.e., $872,828.00 x 3 = $2,618,484.00). Applying the highest multiplier found in an Oklahoma reported decision (40% of lodestar), the total fee award in this case should not have exceeded $1,221,959.20 (i.e., $872,828.00 x 1.40 = $1,221,959.20).

Clearly, the trial court did not act as a fiduciary of the class. Indeed, the $7.52 million dollar contingency fee award entered by the trial court compensates Class Counsel at the hourly rate of $2,059.00 per hour (i.e., $7,520,000.00 ÷ 3,652 hours = $2,059.00 per hour). Chesapeake respectfully submits that by compensating Class Counsel at such an outrageous rate, the trial court fell short of its fiduciary duty to the class.

D. The Trial Court Erred When it Denied Discovery.

Both the Class Fund and Fee Fund were negotiated by Class Counsel as a part of a single settlement. The net effect of this settlement agreement was that Class Counsel negotiated for themselves a $11.2 million dollar fee from the class members' $30 million dollar common fund, together with a "clear sailing agreement" to assure that this negotiated fee could not be effectively disputed at the fairness hearing.

According to *Newberg on Class Actions*, it is a direct conflict of interest for Class Counsel to contemporaneously negotiate with or accept from the defendant an attorney fee in a common fund case:

> [T]he prevailing approach to the settlement of class actions for damages is the agreement of the defendant to create a certain fund for the benefit of the class and for class counsel to look to the fund as the source for a court award of reasonable counsel fees. Once paying the fund ... only the court has the authority to bind the class by charging the fund with reasonable counsel fees and costs. ***Within the context of negotiating for a common fund settlement on behalf of a class, class counsel would have a direct conflict with the class in negotiating for or accepting the defendant's offer for a specific fee award to be paid by the settling defendant***, simultaneously with negotiating for a sum for a common fund recovery for the class. Class counsel would be placed in the position of wearing two hats with contrary interests, and the court would have the almost impossible task of deciding whether the class settlement was fair and adequate or whether it should have been increased by some or all of the funds allocated by the attorneys for the fees. ***The courts have specifically frowned on this simultaneous or contemporaneous negotiation for a common fund settlement and for fees.***

See Newberg of Class Actions, §15.31 (3rd Ed. 1992) (emphasis supplied.)

Chesapeake respectfully submits that as a fiduciary of the class, it was incumbent upon the trial court to fully investigate the facts and circumstances that lead to a creation of the separate Fee Fund and clear sailing agreement. *See e.g. Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d at 524 ("[T]he very existence of a clear sailing provision increases the likelihood that class counsel have bargained away something of value to the class.") Not only did the trial court refuse to allow Chesapeake any discovery pertaining to the underlying negotiations between Class Counsel and Koch, the trial court made no independent investigation on behalf of the Class. The trial court could have appointed a skilled and experienced receiver or special master to do this investigation for him, as Chesapeake requested, at Class expense, but the court refused. This was his prerogative; however, it was not then acceptable for him as a fiduciary to do no investigation at all.

Because no discovery was allowed (and no investigation conducted), regarding the underlying settlement negotiations between Class Counsel and Koch, the ultimate fairness of the settlement can never be determined. All that is known is that Class Counsel engaged in a direct conflict of interest. This matter should be reversed and remanded to the trial court with instructions to allow the requested discovery to determine whether the Class was treated fairly.

E. The Notice Mailed to the Class is Misleading.

The Notice sent to the Class stated that there were two funds – (1) a "Class Fund" of $18,800,000.00 available to the Class, and (2) a "Fee Fund" of $11,200,000.00 available to Class Counsel. The Notice also stated that Class

Counsels' Fee Fund would *"not reduce the amount of money that is available for payment to Class Members"*. Clearly, this statement was made to discourage objections by class members to the $11.2 million dollar Fee Fund, implying it as a *fait accompli* and would not affect the class members' distribution anyway.

Three (3) days *after* the deadline for class members to file objections to the class action settlement, Class Counsel filed a fee application in this case admitting for the first time that the common fund was, in fact, really $30,000,000.00 rather than the $18,200,000.00 Class Fund previously represented to be available to the Class. By invoking the common fund doctrine, Class Counsel unquestionably acknowledged that any attorney fees awarded by the trial court would effectively reduce the amount of money that would have otherwise been available to the Class as the common fund. Indeed, the concept described in the Notice that there are two distinct funds – a Class Fund independent of the Fee Fund, was illusory and deceptive. The case was settled in a single settlement agreement for $30,000,000.00, yet then mis-characterized as two separate funds, with the clearly improper and unethical purpose of enhancing Class Counsel's chance of securing their desired attorneys' fee. Defendant's counsel had no incentive or duty to the Class to protect them from this occurrence. That duty falls on the Class Counsel and the trial court. The Class should have been notified that their ultimate recovery in this case would be reduced by attorney fees, as in most other class action settlements. As the statutory fiduciary of the Class, the trial court should have immediately ordered the Notice to be corrected and resent to all Class members. Since this was not done, this case should be reversed and remanded with instructions that a corrected notice be resent so that class members have a clear understanding of how their purported lawyers and representatives are affecting their rights.

CONCLUSION

The entire process of seeking and obtaining trial court approval of the settlement and the attorneys fee award in this class action was defective at best and unethical at worst. The trial court failed to exercise and satisfy its statutorily mandated fiduciary duty to protect the class members to assure the attorney fee award was fair and reasonable. Instead, the trial court settled on a novel "not shocking" standard of review after hearing only one-sided biased testimony. In doing so, the court ignored the law and put the interests of Class Counsel above those of their clients and the court's fiduciary beneficiaries. Based upon the foregoing argument and authority, Chesapeake respectfully submits that the trial court's order approving the class action settlement at issue should be reversed.

Respectfully submitted,

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